Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-28

INSTITUTE OF SCRAP IRON AND STEEL, INC., et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

and

THE INTERSTATE COMMERCE COMMISSION,

Appellees,

and

LOUISVILLE AND NASHVILLE RAILROAD CO., et al.,

Railroad Appellees,

On Appeal From The United States District Court For The District Of Columbia

APPELLANTS' BRIEF OPPOSING MOTIONS TO AFFIRM

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Pursuant to Rule 16(4) of the Rules of this Court, Appellants file this brief in opposition to Appellees' motions to affirm the decision below. The issues raised by this appeal are indeed substantial and merit a full hearing by the Supreme Court. What is at stake here is perhaps the most fundamental issue of transportation law, not a

narrow procedural technicality as was involved in *Bowman Transportation, Inc.* v. *Arkansas Best Freight System,* 419 U.S. 281. The major issue in this proceeding is whether a shipper is entitled to a receipt from a common carrier showing the quantity of goods tendered to the carrier for transport.

The unambiguous wording of 49 U.S.C. 20(11) requires the railroads to issue a "receipt or bill of lading" to the shipper upon delivery of the goods to the carrier for transportation.

> "The Carmack Amendment requires the carrier receiving property for transportation between points in different states to issue a receipt or bill of lading therefor and makes the carrier liable to the lawful holder thereof for any loss, damage or injury to such property." *Southern Pacific Co.* v. *Stewart,* 245 U.S. 359, 362 (1917)

Appellees admit that receipts or bills of lading must be issued to shippers but deny that the weight or quantity must be stated thereon. However, this Court held that a bill of lading is both a receipt for the quantity of goods shipped and a contract for shipment of the goods.

> "Such an instrument is twofold in its character; that is, it is a receipt as to the *quantity* and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Beyond all doubt a bill of lading, in the usual form, is a receipt for the *quantity of goods shipped* and a promise to transport and deliver same as therein stipulated." *The Delware,* 81 U.S. 579, 601, 14 Wall 579, 20 L.Ed. 779 (1871) (Emphasis added)

In *Schalb* v. *Erie R. Co.,* 293 N.Y.S. 842, 845, 161 Misc. 743 (1937), the Court held:

> "One of the first functions of a bill of lading, as stated above, is to describe the *quantity,* condition, and quality of the goods shipped." (Emphasis added)

Not only do Section 20(11) and the common law require the issuance to all shippers of bills of lading or receipts indicating the quantity of goods tendered for transportation, but issuing receipts and bills of lading showing quantities to some shippers and not to others is discriminatory in violation of Sections 2 and 3 of Title 49. This is because the shipper who is not furnished a bill of lading showing the origin weight must pay an extra charge for origin weighing service, so that he, like the competing shipper whose bill of lading includes the origin weight, will be able to prove his case if a loss in transit occurs. In the very competitive scrap iron market the shipper who must bear an extra expense for origin weighing for each carload suffers discrimination vis a' vis the scrap shipper whose cars are weighed at origin without extra charge.

The cases cited by Appellees are distinguishable. The requirements of Section 20(11) were not at issue in *Anaconda Copper Mining Co. Terminal Service,* 264 I.C.C. 103; 266 I.C.C. 387; *Baird* v. *St. Louis, I. M. & S. Ry. Co.,* 41 F. 592 (E.D. Ark. 1890), or *United States* v. *Interstate Commerce Commission,* 73 F.2d 948 (Ct. App. D.C. 1934), cert. den., 294 U.S. 712 (1935).

Prior to publication of the assailed tariff the standard practice in the railroad industry was for shipments to be weighed at point of origin or as near thereto as practicable. *In Re Weighing of Freight by Carrier,* 28 I.C.C. 7, 36 (1913). Elimination of origin weighing without extra charge violates the Interstate Commerce Commission's rule that:

> ". . . it will not allow a separate charge for an accessorial service previously performed as part of the line-

haul rates without substantial evidence that such an additional charge is justified measured against the overall reasonableness of the increased line-haul rate resulting therefrom." *Wichita Board of Trade* v. *U.S.*, 352 F. Supp. 365, 368 (D. Kansas) affirmed in part, reversed in part sub nom., *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade,* 412 U.S. 800 (1973).

The rationale for this rule was set forth by Justice Marshall of this Court:

> "The explicit purpose of the rule in this situation is to guarantee that shippers receiving the same service they had previously received to not pay an unreasonable amount . . . [citations omitted]. The rule, in this regard, is that the railroads must demonstrate both that the proposed charge is reasonable in light of the costs of the separate service, and that the total charge for line haul plus the separate service is reasonable." *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade,* 412 U.S. 800, 811 (1973).

The assailed tariff now requires the shipper to pay an extra charge for weighing at origin which was formerly provided as a part of the line-haul freight rate. The railroads have not lowered freight rates to take account of this dimunition of service. Neither in the Orders of the Commission nor in the Opinions of the Court below was it stated that the railroads demonstrated that the charge for origin weighing is reasonable or that the total charge for line-haul plus origin weighing is reasonable.

If a shipper has no receipt or bill of lading showing the quantity of scrap iron delivered to the carrier at origin, there is no specific basis to prove losses in transit which might have occurred and to collect for such losses from the railroad. By eliminating weighing at origin the

carriers seek to limit their liability for losses. This amounts to a rate increase although the carriers offered no evidence before the Commisison to justify higher rates.

> "A rule narrowing the carriers' previously acknowledged liability for loss and damage is akin to an increased rate." *Northern Potato Traffic Asso.* v. *C. & N.W. Ry. Co.,* 53 I.C.C. 100, 101, 102.

Obviously, the carriers seek to reduce their payments to shippers for losses of goods transported. However, losses in transit are the fault of the railroads, not shippers.

If the railroads prevail in limiting or extinguishing their responsibility to provide shippers with a receipt or bill of lading showing the quantity of goods tendered for transport, it seems reasonable to assume that these common carriers will seek to eliminate other common law and statutory transportation duties.

Although an origin weight might not be required by shippers of every commodity, it is vital for scrap consignors. Commissioner O'Neal stated in his dissenting opinion (Jurisdictional Statement, p. 19a):

> "While a weighing may not be necessary to determine exactly what the shipper tendered and the carrier received with respect to some commodities, it certainly seems necessary with respect to scrap. The commodity cannot be inventoried by unit count, and it cannot be measured on the basis of volume. Therefore, although origin weighing may be unnecessary to the issuance of a receipt for some commodities, it seems imperative with respect to scrap."

The Commission's decision upholding a tariff that is violative of the plain wording of Section 20 (11) 49 U.S.C., as well as the common law, is erroneous and probable jurisdiction should be noted for the reasons stated herein and in the Jurisdictional Statement.

"The delegation to the Commission is not, of course, unbounded, and it is the duty of a reviewing court to determine whether the course followed by the Commission is consistent with its mandate from Congress." *Atchison, Topeka and Santa Fe Railway Company* v. *Wichita Board of Trade,* 412 U.S. 800, 806 (1973).

Respectfully submitted,

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